ALJ/XJV/t93

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Decision 01-06-034 June 14, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The City of St. Helena, Town of Yountville, County of Napa, Napa Valley Vintner Association, Complainants, vs. Napa Valley Wine Train, Inc., Defendant.	Case 88-03-016 (Filed March 7, 1988)

OPINION GRANTING PETITION FOR MODIFICATION, IN PART

Summary

We grant, in part, the petition filed by the City of St. Helena (St. Helena), for modification of prior decisions concerning the Napa Valley Wine Train, Inc., (Wine Train). We conclude that Wine Train's passenger excursion service does not constitute regulated transportation and in providing such service, Wine Train is not functioning as a public utility. Thus, this Commission should not regulate the schedules and fares for Wine Train's excursion passenger service. While Wine Train's present freight carriage and future "through ticketing" of Amtrak passengers constitute public utility services, the public utility purpose, if any, of the proposed St. Helena station is de minimis. The safety of the operation of all services, including excursion passenger service, remains subject to Commission regulation.

Procedural Background

On September 16, 1999, St. Helena filed this petition for modification of Decision (D.) 96-06-060 and D.96-11-024, both of which issued in 1996. (See D.96-06-060,

(1996) 66 CPUC2d 602, as modified by D.96-11-024, (1996) 69 CPUC2d 243.) The earlier decision, D.96-06-060, approved the Wine Train's project subject to specified conditions and limitations and subject to a Mitigation Implementation Program/Implementation Schedule. D.96-11-024 denied rehearing but modified D.96-06-060 in certain respects.

St. Helena's petition has reopened Case (C.)88-03-016. St. Helena commenced that proceeding more than a decade ago, together with three other named complainants who are not parties to the instant petition. On October 18, 1999 Wine Train filed a response to St. Helena's petition.

By ruling dated December 24, 1999, the assigned administrative law judge (ALJ) set a prehearing conference (PHC) and directed the parties to meet and confer beforehand in order to be prepared to address informally several legal and factual matters enumerated in the ruling. At the January 11, 2000 PHC, both parties stated they needed to conduct discovery before they could respond fully to the questions in the ruling. They requested additional time, which was granted, and stated that they anticipated that ultimately they would be able to file a joint factual stipulation, followed by legal briefs. As a case management tool, the assigned commissioner issued a scoping memo following the PHC, though this reopened proceeding is not governed by the procedural requirements enacted by Senate Bill 960.[1]

Subsequently, the parties made the following filings: a stipulation of facts (Stipulated Facts) on July 6, 2000; concurrent opening briefs on July 28; and concurrent reply briefs on August 31. The Stipulated Facts and St. Helena's opening brief were both refiled on December 7, 2000 in order to supply appendices discussed in the original filings but inadvertently omitted from them.

Neither party has requested an evidentiary hearing and both have urged the Commission to resolve this dispute based on the written record.

[1] Stats. 1996, ch. 856 (SB 960, Leonard). Among other things, SB 960 requires issuance of a scoping memo.

Relief Requested by Petitioner

St. Helena asks us to modify D.96-11-024, the rehearing decision, in two respects:

1. Delete the several pages of textual discussion of Commission jurisdictional authority subtitled "Paramount Jurisdiction" and substitute in its place several paragraphs which St. Helena has included in the petition. The language St. Helena proposes would make two determinations: (a) Wine Train's service is an excursion service which does not constitute "transportation" under Pub. Util. Code §211 and thus, (b) Wine Train is not a public utility under §216.[2]

2. Delete the language in Ordering Paragraph 1 (which expressly modifies D.96-06-060 [at mimeo. page 13, third paragraph, first sentence[3]]) and substitute in its place two sentences that St. Helena endorses. St. Helena's proposed replacement states:

> Considering the nonutility nature of the Wine Train's operations, we view our authority in this proceeding limited to our role as the lead agency for environmental review. Thus, local agencies will have paramount jurisdiction over land use and other matters of local concern. (Petition, p. 3.)

Discussion

Recently, in D.99-08-018, which dismissed a 1999 complaint by St. Helena, we recounted the history of the Wine Train over the last decade, including developments in the courts and the Legislature and at other regulatory agencies.[4] We do not repeat that

[2] Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

[3] Ordering Paragraph 1 of D.96-11-024 actually replaces the entirety of the third paragraph of page 13, not just the first sentence.

[4] D.99-08-018, slip op. at pp.2-3. The 1999 complaint questioned Wine Train's public utility status and sought an advisory opinion. We dismissed the complaint for the reasons stated in the decision but noted that if Wine Train believed it had grounds to file a petition for modification under Rule 47, it might do so.

historical recitation in this decision but move directly to the matters raised by St. Helena's petition and addressed in the subsequent pleadings of record.

At the heart of the instant dispute is whether Wine Train may build a station, over St. Helena's objection, near the site of the railroad turn-around Wine Train uses at present at the southern end of St. Helena's downtown district. Specifically, Wine Train wants to construct a passenger loading platform, bathroom facilities, and a parking lot for ten cars and four buses so that it can begin disembarking and boarding passengers in St. Helena. Wine Train has asked the local planning commission for a General Plan Amendment, Zoning Ordinance Text Amendment, Use Permit and Design Review (local permits) so that it can begin construction. It appears from the pleadings that the parties' continuing jurisdictional dispute has stalled the local planning commission's consideration of Wine Train's request. However, Wine Train's Vice President of Railroad Operations states that plans for two other stations are advancing. Permits for the Yountville Station have been obtained and "[o]nce construction is completed in the near future, Wine Train will disembark passengers at Yountville. Plans for the Rutherford Station are in the local permitting process…". (Wine Train Opening Brief, Declaration of Gary Rouse.)

Rule 47 governs the Commission's consideration of petitions for modification of its decisions. Rule 47(b) requires the petitioner to support, by declaration or affidavit, allegations of new or changed facts that warrant the relief requested. Rule 47(d) provides that a petition generally must be filed within one year of the effective date of the decision proposed to be modified; if more than a year has transpired, the petition must explain the reason for the delay.

St. Helena's petition asserts that Wine Train's efforts to secure the local permits subsequent to the issuance of D.96-11-024 have "shown that the true character of its intended operations is to provide excursion service, not public utility service." (Petition, p. 3-4.) St. Helena points to a letter, dated September 25, 1998, submitted to city planning commissioners by Wine Train's counsel which states: "We have obtained data on other excursion train operations in northern California." (Petition, p.4 and Attachment

to Declaration.) The letter reviews the station arrangements at several railroads which the Commission does not regulate as public utilities: the Santa Cruz, Big Trees and Pacific Railroad Company; the Roaring Camp and Big Trees Narrow Gauge Railroad; and the Sacramento Railroad Museum.

Wine Train counters that neither its scope of operations nor its plans for a St. Helena station are new, but are the same ones described in Wine Train's initial submission to the local planning commission in November 1996, following issuance of D.96-06-060.[5] (Response, p. 5 and Attachment A.)

We note that an even earlier document, the 1993 final environmental impact report (FEIR), stresses the "recreational" nature of Wine Train's proposed service and plainly states that "commuter service" is not intended.

> NVWT is a recreational transportation system that also provides food and beverage service to passengers visiting the Napa Valley. The NVWT could serve as an alternative to private automobiles for persons touring the Napa Valley and visiting local wineries and other visitor attraction in the areas. Bus shuttle service between station locations and participating wineries is proposed for NVWT passengers. *Local commuter service is not proposed*. (Executive Summary, p. S-3, emphasis added.)

[5] D.96-06-060 describes the authorized project as follows:

> Train operations under the preferred alternative would increase to 5 trains per day on Fridays and 6 trains on weekend days, with not more than 35 trains per week, until monitoring data show less-than-significant impacts. Monday through Thursday operations would be tied to passenger demand, with ultimate service of no more than 6 trains per day during peak months and typically fewer than 5 trains per day during non-peak months.
>
> * * *
>
> As monitoring is conducted and information received that impact levels are not exceeded while operations are performed at a maximum of 5 trains per day Wine Train may wish to expand operations eventually to 6 trains daily.

(D.96-06-060, 66 CPUC2d at 612.)

The project approved in 1996 clearly contemplates – but does not require – the eventual construction of one or more up valley stations at Yountville, Rutherford and/or St. Helena and it specifically restricts passenger operations as long as the train remains limited to round trip service from the Napa station. The approved project also authorizes Wine Train to schedule freight service,
which it operates along the same right of way (ROW) and track as the passenger service, during periods when passenger service is not operating.

Both D.96-06-060 and the earlier FEIR certification decision, D.93-07-046, discuss the phased nature of the project.[6]

> The environmentally preferred project is a "phased project," beginning with implementation of winery stops along the ROW and a minimum of one up-valley station stop, with shuttle service to wineries. This alternative is responsive to the 61% of Wine Train riders surveyed who stated that they would use the train and shuttles as their means of travel in and around Napa Valley if the train were allowed to stop up-valley, whence shuttles would take them to wineries and other visitor attractions. . . . This alternative would provide for continued operation of the brunch, lunch, and dinner trains, with a fourth train as a "pick-up" train for passengers who disembarked up-valley to be transported back to the McKinstry Street Station in Napa.
>
> The phased project is responsive to the primary comments on the DEIR questioning the use of the train as a mode of transportation - which can best be tested after up-valley stops are implemented. The phased project would allow train operations to increase as monitoring information substantiates that impacts do not exceed the thresholds of significance established in the EIR, and/or mitigation measures are in place. (D.96-06-060, 66 CPUC2d at 608-609.)

[6] In its brief, St. Helena's states that D.96-06-060 approved the FEIR. More accurately stated, D.93-07-046 certified the FEIR and D.96-06-060 approved the Wine Train project subject to a mitigation and monitoring plan after resolving issues identified by the FEIR. D.96-06-060 determined that the adopted plan reduced certain environmental impacts to a level of insignificance and found that overriding considerations justified others.

Factually, nothing has changed since issuance of D.96-11-024, Wine Train argues, and therefore we must dismiss St. Helena's petition summarily, in accordance with Rule 47, with § 1709 (which provides that final Commission decisions are conclusive in all collateral actions or proceedings) and with the common law doctrines of res judicata and judicial estoppel.

We conclude, after review of the parties' factual stipulations and their briefs, that St. Helena has failed to make a case that the underlying facts have changed in any material way. Nor have we any evidence that Wine Train is pursuing a project different from the one already approved.

We turn next to St. Helena's claims that the Commission has asserted authority in excess of its subject matter jurisdiction in portions of D.96-06-060 and D.96-11-024. As Witkin explains, California courts have allowed collateral attack on the basis of several exceptions to the doctrine of res judicata, elucidated in The Second Restatements of Judgments and Conflict of Laws. (See Witkin, 2 Calif. Procedure, Jurisdiction §§338-339, pp. 926-928.) In a case concerning an apartment developer's noncompliance with the municipal building code, the Court of Appeals determined:

> All of the exceptions to the res judicata effect of a determination of subject matter jurisdiction, set forth in the Restatements, were applicable here. (1) lack of jurisdiction clear; (2) question one of law; (3) tribunal one of limited jurisdiction (an administrative agency); (4) jurisdictional issue not actually litigated (although record was silent, no party suggested that the matter was raised); (5) strong policy against acting against jurisdiction (policy that administrative agencies keep within their limited jurisdiction). (*San Francisco v. Padilla* (1972) 23 Cal. App.3d 388, 400.)

St. Helena contends that these same factors are substantially present in this case, though it admits whether the jurisdictional issue was actually litigated is a debatable point. According to St. Helena, though the jurisdictional issue was raised in the complaint and answer (both filed in 1988), "it was immaterial to D.96-06-060, which was

predicated on the Commission's environmental review authority pursuant to Public Resources Code Section 21080.4".[7] (St. Helena opening brief, p. 2, fn. 1.) St. Helena further argues: "Only after the Commission was asked to address the issue of concurrent jurisdiction did the Commission deem the Wine Train a 'public utility' in D.96-11-024. However, the holding is not supported by any findings of fact or conclusions of law." (*Ibid.*)

The Commission "was asked to address the issue of concurrent jurisdiction" at the appeal stage, after D.96-06-060 issued. D.96-06-060 declared the Wine Train's "interurban operation" and the proposed up-valley stops "to be one of statewide, rather than merely municipal concern" and concluded that local agencies may impose "reasonable local ordinances, such as relate to building code restrictions" but "may not deny Wine Train the right to perform such operation or stops". (66 CPUC2d at 610.) As St. Helena contends, to support these statements the Commission substantially amplified the jurisdictional discussion in D.96-11-024, which denied rehearing, and clearly relied on its general regulatory authority over public utilities as well as the environmental review authority expressly conferred upon it by Public Resources Code Section 21080.4.

We are persuaded that this case indeed comports with the last four of the Restatement's five res judicata exceptions, since St. Helena has made a convincing argument that the ultimate jurisdictional argument had not been litigated directly at the time we issued D.96-06-060. But does this case meet the first exception, i.e., is "lack of jurisdiction clear"?

[7] That statute, enacted through emergency legislation in 1990, provides that Wine Train's project is subject to CEQA, explicitly abrogates the holding of the California Supreme Court to the contrary, and designates the CPUC as the lead agency. (See *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal 3d 370, annulling the Commission's 1988 determination that under then-existing law, Wine Train's project was subject to CEQA.)

D.96-06-060 and D.96-11-024 appear to assume this Commission's public utility jurisdiction over the Wine Train without examining the nature of the services offered.[8] Though Wine Train is part of the interstate rail network by virtue of its connection with California Northern Railroad at Rocktram, California (Napa), in 1992 the Interstate Commerce Commission (ICC), which was the predecessor to the Surface Transportation Board, held that that the Wine Train's passenger operations are not subject to its jurisdiction.[9] ((1991) 7 ICC 2d 954.) Thus, by default, the passenger operations are either unregulated or they are public utility common carriage and therefore, subject to the regulatory jurisdiction of this Commission.[10]

[8] While it is true that D.88-07-019, the Commission's 1988 authorization of preliminary, limited service by Wine Train in the Napa Valley corridor, held that the Commission had jurisdiction over Wine Train's proposed service, that decision was annulled by the California Supreme Court in 1990. (See *Napa Valley Wine Train, Inc. v Public Utilities Com*. (1990) 50 Cal 3d 370, holding that the Wine Train project was exempt from the California Environmental Quality Act (CEQA) under then-existing law.) The 1990 enactment of Pub. Res. Code § 21080.04, following soon after the Supreme Court's decision, made Wine Train's project subject to CEQA and designated the CPUC as the lead agency. (Stats. 90-1654 [Assembly Bill 4370 – Hansen].) The new statute resurrected this proceeding.

[9] The ICC determined that under federal law neither the fact that Wine Train carries a limited amount of interstate freight nor its potential ability to offer "through ticketing" to Amtrak passengers warrant federal regulation of Wine Train's passenger service. The ICC discussed at length several factors which make Amtrak passengers unlikely to use Wine Train to any significant degree, thus rendering such service incidental. First, "through ticketing" is not possible until Wine Train has one or more up-valley stops and can actually disembark passengers beyond Napa. Second, such passengers cannot get to Napa by rail interconnection at Rocktram but must be transported by bus from Amtrak's station in Martinez and will require a separate ticket for that journey. Third, Wine Train is slow – the 18-trip mile trip from Napa to St. Helena takes up to 1 1/2 hours.

[10] Section 211 defines "common carrier" to mean persons and corporations providing "transportation for compensation" to the public or a portion of it and includes all railroad corporations and other rail car corporations, including rail freight operations. Section 216 provides that common carriers are public utilities subject to the regulatory jurisdiction of this Commission.

Wine Train's passenger service consists primarily of its excursion sightseeing and dining service. The vast majority of passengers purchase reservations to dine aboard the train during the approximately 2 1/2 to 3 hour round trip through the lower Napa Valley from Napa to St. Helena and back. By special advance arrangement, passengers may disembark to visit several wineries with trackside frontage but there are no other authorized stops. As noted in footnote 6, though Wine Train's tariff includes "through ticketing" of Amtrak passengers (who must be transported to Napa by bus from Amtrak's station in Martinez), this service remains prospective until one or more up-valley stops can be made and even then, it will be secondary to the round-trip dining options.

St. Helena argues that the round trip excursion service which constitutes most of Wine Train's business simply is not public utility transportation. As St. Helena points out, under current law, when travelling from the point of departure in a continuous loop back to that same point to provide passengers with a sightseeing tour, neither ferries nor buses are subject to this Commission's regulatory jurisdiction. (See *Golden Gate Scenic Steamship Lines, Inc. v. PUC* [*Golden Gate Scenic Steamship Lines*], (1962) 57 C.2d 373, held: CPUC exceeded its jurisdiction in finding that sight-seeing vessels required a CPCN under § 1007; *Western Travel Plaza, Inc. et al.* [*Western Travel Plaza*], D.93726, (1981) 7 CPUC2d 128, held: sightseeing is not a public utility passenger stage operation, rehearing denied D.82-09-087, (1982) 9 CPUC2d 681.)

In 1998 the Commission had occasion to reconsider its regulatory policy with respect to passenger excursion services by rail when it examined the Skunk Train tours offered by California Western Railroad (CWRR), a wholly intrastate system which is not part of the interstate rail network. The Commission made several observations about Wine Train:

> There are 15 railroad companies in California that provide excursion passenger service of which all but two are not regulated by the Commission. The two railroads regulated by the Commission are CWRR and the Napa Valley Wine Train (Wine Train).

> In the case of Wine Train, the Commission regulation involves the monitoring and enforcement of a program to mitigate any adverse impact of the operation of Wine Train on the environment. The Mitigation Implementation Program adopted by the Commission, under Section 21081.6 of the California Environmental Quality Act (CEQA), was part of the assessment of environmental impact of the operation of trains. Under the Mitigation Implementation Program, the Commission specifies, among other things, the hours of the day during which Wine Train can operate. The Commisson does not regulate Wine Train's schedule or rates. (Application of California Western Railroad, Inc. [*Skunk Train*], D.98-01-050, 1998 Cal. PUC LEXIS 189 *2.)

Skunk Train describes excursion passenger services through the scenic Noyo River Valley which accounts for over 90% of CWRR's operations. The decision relates that these rail sightseeing tours carry passengers from Fort Bragg either all the way to Willits or to Northspur, a midpoint location, and then back to Fort Bragg. After concluding that differences between the Skunk Train's services and those of excursion buses and ferries "is of degree, not kind", the Commission held that Skunk Train's passenger excursion services do not constitute regulated transportation and that in providing such service, CWRR is not functioning as a public utility.[11] (*Id*. 1998 Cal. PUC LEXIS 189 *7.) More specifically, the first two ordering paragraphs in *Skunk Train* provide:

> 1. The schedules and fares for the excursion passenger service provided by California Western Railroad (CWRR) shall not be subject to regulation by the Commission.

[11] The *Skunk Train* decision states, "We conclude that CWRR's excursion service does not constitute "transportation" under PU Code § 1007." (*Id*. 1998 Cal. PUC LEXIS 189 *7.) Since § 1007 applies expressly to "vessels" and not to other kinds of common carriers, this statement is inartful. However, as the fuller discussion makes clear, the Commission's focus is upon excursion and sightseeing versus public utility regulation. As the Commission stated when it denied rehearing of *Western Travel Plaza*: "Public utilities are ordinarily understood as providing essential services – the kind that other industries and the public generally require . . . We believe that the elevation of sightseeing service to this status . . . is a mistake." (9 CPUC 21 at 687)

2. The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission. (*Id.* 1998 Cal. PUC LEXIS 189 *9 - *11.)

Thus, *Skunk Train* tacitly recognizes a distinction between entities which provide only unregulated services (e.g. the ferries in *Golden Gate Scenic Steamship Lines* and the buses in the *Western Travel Plaza* decisions) and those which also, even if incidentally, provide "transportation" of freight or passengers in the legally recognized sense.

As we look squarely at the question today, we cannot readily distinguish Wine Train's round trip excursion service from Skunk Train's. All of the passenger services Wine Train offers at present provide round trip sightseeing while dining by rail; such service is "essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Western Travel Plaza,* 7 CPUC2d at 135.) Nor is Wine Train's proposal to disembark tourists up-valley for more sightseeing and/or to connect with day trip shuttle tours a type of regular route, point-to-point transportation between cities, commuter service, or home-to-work service. We return to the observation the Commission made went it denied rehearing of *Western Travel Plaza*, and repeated again in *Skunk Train*: "The basic question is whether sightseeing is a public utility function. In the absence of a clear declaration by the Legislature, we conclude that it is not." (9 CPUC2d at 687.) We see no reason to reach a different conclusion with respect to Wine Train and believe it was erroneous for the Commission to do so in D.96-06-060 and D.96-11-024. We must repeat the words of *Western Travel Plaza*: "[H]aving discovered the error it may not be ignored." (7 CPUC2d at 135.) In the ordering paragraphs, we modify D.96-06-060 and D.96-11-024 consistent with the foregoing discussion.

Our conclusion does *not* mean that none of Wine Train's operations are public utility functions or that we have no safety oversight of Wine Train's excursion service.

However, a direct implication of this conclusion is that the incidental public utility purpose, if any, of the proposed St. Helena station is de minimis.[12]

Wine Train's freight service – however limited its nature – remains common carrier transportation of property. Under the ICC Termination Act of 1995 (ICCTA), the Surface Transportation Board has exclusive jurisdiction over the rates, terms and conditions of that freight service. Serving as a participating agency with the Federal Railroad Administration (FRA), the Commission is charged with safety oversight of freight operations (including inspection of rail cars, track, etc.). The Commission also may enforce state safety laws needed to eliminate or reduce local safety hazards as long as they place no undue burden on interstate commerce.[13] Should Wine Train disembark Amtrak passengers at Yountville, Rutherford, or St. Helena in future, such service will constitute common carriage of persons and in light of the 1992 ICC holding, will be subject to this Commission's direct regulatory jurisdiction (including existing safety oversight) under the Public Utilities Code and corresponding General Orders.[14]

Skunk Train comments that though the Commission ceased to regulate the schedules and fares of bus sightseeing tours, the buses and their operators remained subject to safety regulations enforced by various state agencies. Accordingly, consistent with § 765.5, *Skunk Train* requires continued safety regulation of all CWRR's services, including its excursion rail tours, as well as continued regulation of the upkeep and reliability of grade crossings and crossing protection devices under §§ 1201 et seq. We

[12] We disregard Wine Train's statement that it is exploring "the feasibility of using Wine Train ROW, facilities, and equipment to provide commuter passenger services between points in Napa County and Vallejo". (Wine Train Opening Brief, Declaration of Gary Rouse.) Such service is outside the scope of the Wine Train's proposed project and was not reviewed in the FEIR.

[13] See 49 U.S.C. §2016, which is part of the Federal Railroad Safety Authorization Act (FRSAA), codified in 1994. The preemptive scope of the ICCTA and the FRSAA (as well as its predecessor, the Federal Railroad Safety Act (FRSA)), are discussed at length in an April, 2000 decision of the California Court of Appeals, *Jones et al. v. Union Pacific Railroad Company.* (79 Cal App. 4th 1053.)

[14] For example, §765.5 provides in relevant part: "The purpose of this section is to provide that the Commission takes all appropriate action necessary to ensure the safe operation of railroads in this state." (§765.5(a).)

see no reason to treat Wine Train differently in this respect, either, and so will require continued safety oversight of all its operations, consistent with *Skunk Train*.

Comments on Draft Decision

The draft decision of the ALJ was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Wine Train filed comments on April 23, 2001, and St. Helena filed reply comments on April 30. The Commission held oral argument on the draft decision on June 12.

Findings of Fact

1. Wine Train's round trip excursion service cannot be distinguished from CWRR's Skunk Train excursion service in any meaningful way.

2. Wine Train's proposal to disembark tourists up-valley for more sightseeing and/or to connect with day trip shuttle tours is not a type of regular route, point-to-point transportation between cities, commuter service, or home-to-work service.

3. Wine Train's passenger excursion service does not constitute regulated transportation and in providing such service, Wine Train is not functioning as a public utility.

4. The incidental public utility purpose, if any, of the proposed St. Helena station is de minimis.

5. Wine Train's freight service – however limited its nature – is common carrier transportation of property over the interstate rail network.

6. Should Wine Train disembark Amtrak passengers at Yountville, Rutherford, or St. Helena in future, such service will constitute intrastate common carriage of persons.

Conclusions of Law

1. St. Helena has not established the factual predicate for the granting of a petition for modification under Rule 47(b).

2. Consistent with *San Francisco v. Padilla*, supra, res judicata does not bar our review of subject matter jurisdiction determinations made in D.96-06-060 and D.96-11-024.

3. *Golden Gate Scenic Steamship Lines* and the *Western Travel Plaza* decisions, supra, discuss ferries and buses, respectively, which provide only unregulated services.

4. *Skunk Train*, supra, concerns an entity which provides "transportation" of freight and passengers as well as an excursion passenger service.

5. Consistent with *Skunk Train* and our statutory rail safety obligations, we should require continued safety oversight of all Wine Train's operations.

6. We should grant St. Helena's petition, in part, and modify D.96-06-060 and D.96-11-024 consistent with the discussion in this opinion.

7. No hearing is necessary.

O R D E R

IT IS ORDERED that:

1. Decision (D.) 96-11-026 is modified as follows:

   a. Delete Ordering Paragraph 1 in its entirety, found at page 7 of D.96-11-024 and at 69 CPUC2d 243, 246:

   b. Replace Ordering Paragraph 1 with the following:

> 1. The original text of the third paragraph of page 13 of D.96-06-060 is modified as follows:
>
> Considering the *Harbor Carriers* and *Orange County* decisions together, we view our authority in this proceeding as concurrent with that of any local agency affected by operation of the Wine Train. That is, we may approve this project pursuant to CEQA, involving operations by Wine Train between points in Napa Valley, including up-valley stops, with the expectation that a local agency may impose reasonable local ordinances, such as relate to building code restrictions, *on* Wine Train*'s* operations or stops.

   c. Under the subsection entitled "II. ALERT APPLICATION" and subtitled "A. *Paramount Jurisdiction*", delete the last sentence of the first paragraph on page 3 of D.96-11-024 which states "ALERT's arguments are unconvincing", and delete the remainder of the text up to but not including the next subtitle, "B. *Overriding*

Considerations", at page 6. This text is also found at 69 CPUC2d 243, 244-246.

d. Under the subsection entitled "II. ALERT APPLICATION" and subtitled "A. *Paramount Jurisdiction*", add a final sentence to the first (and only) paragraph on page 3 of D.96-11-026, as follows: "ALERT's arguments convince us to modify Ordering Paragraph 1 of D.96-06-060."

2. The schedules and fares for the excursion passenger service provided by Napa Valley Wine Train, Inc.) shall not be subject to regulation by the Commission.

3. The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission.

4. This proceeding is closed.

This order is effective today.

Dated June 14, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
Commissioners

I dissent.

/s/ GEOFFREY F. BROWN
Commissioner

Commissioner Carl W. Wood, being necessarily absent, did not participate.